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In the Supreme Court of the United States

OCTOBER TERM, 1959

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

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INDEX

Page

I. The membership clause of the Smith Act is constitutional even though it be interpreted to permit a conviction based solely on proof that the accused was a member of a group described in the Act, knowing the purposes thereof 5

II. The membership clause of the Smith Act is properly interpreted as requiring proof of specific intent and as so interpreted is constitutional 12

III. The constitutionality of the membership clause is further fortified by the requirement that the membership be established as active membership, and this requirement is reasonably to be included either as a matter of statutory construction or as a constitutional limitation on the application of the Act 21

IV. The "clear and present danger" test as applied to the membership clause and to this particular case sustains the constitutionality of the conviction 28

V. Section 4(f) of the Internal Security Act does not bar prosecution under the membership clause of the Smith Act 33

Conclusion 37

CITATIONS

Cases:

Abby Dodge, The, 223 U.S. 166 27

Abrams v. *United States*, 250 U.S. 616 18–19

American Communications Ass'n v. *Douds*, 339 U.S. 382 ..... 6, 16, 19, 22, 26, 30, 31

Ashwander v. *T.V.A.*, 297 U.S. 288 28

Barenblatt v. *United States*, 360 U.S. 109 30

Blackmer v. *United States*, 284 U.S. 421 ..... 24, 27

Blau v. *United States*, 340 U.S. 159 35

Braverman v. *United States*, 317 U.S. 49 23

Bridges v. *Wixon*, 326 U.S. 135 26

Bryant v. *Zimmerman*, 278 U.S. 63 8

Cases—Continued

	Page
Colyer v. *Skeffington*, 265 Fed. 17, reversed *sub nom.* *Skeffington* v. *Katzeff*, 277 Fed. 129	26
Commonwealth v. *Widovich*, 295 Pa. 311	11
De Jonge v. *Oregon*, 299 U.S. 353	25, 28
Dennis v. *United States*, 341 U.S. 494	5, 6, 12, 13, 14, 15, 20, 28, 29, 30, 31, 32, 34
Dorchy v. *Kansas*, 264 U.S. 286	27
Fleming v. *Rhodes*, 331 U.S. 100	24, 27
Fox v. *Washington*, 236 U.S. 273	30
Frankfeld v. *United States*, 198 F. 2d 679, certiorari denied, 344 U.S. 922	11, 31
Galvan v. *Press*, 347 U.S. 522	26
Gitlow v. *New York*, 268 U.S. 652	29, 32
Hartzel v. *United States*, 322 U.S. 680	17, 26
Lightfoot v. *United States*, 228 F. 2d 861 reversed, 355 U.S. 2	34
McComb v. *Frank Scerbo & Sons, Inc.*, 177 F. 2d 137	24
Morissette v. *United States*, 342 U.S. 246	7
N.A.A.C.P. v. *Alabama*, 357 U.S. 449	8–9
National Labor Relations Board v. *Jones & Laughlin*, 301 U.S. 1	27
Palermo v. *United States*, 360 U.S. 343	3
People v. *Gitlow*, 195 App. Div. 773	11
People v. *Lloyd*, 304 Ill. 23	25
People v. *Ruthenberg*, 229 Mich. 315, writ of error dismissed, 273 U.S. 782	11
Pierce v. *United States*, 252 U.S. 239	23
Rowoldt v. *Perfetto*, 355 U.S. 115	26
Schenck v. *United States*, 249 U.S. 47	18
Screws v. *United States*, 325 U.S. 91	15
Shapiro v. *United States*, 335 U.S. 1	37
Shaw v. *State*, 76 Okla. Cr. 271	25
State v. *Hennessy*, 114 Wash. 351	11
State v. *Kahn*, 56 Mont. 108	11
State v. *Laundy*, 103 Ore. 443	11
Steamship Co. v. *Emigration Commissioners*, 113 U.S. 33	27
Taylor v. *Mississippi*, 319 U.S. 583	19
United States v. *Blumberg*, 136 F. Supp. 269	21, 34
United States v. *Dennis*, 183 F. 2d 201	28

Cases—Continued

	Page
United States v. *Hellman* (D. Mont., Cr. 3722, decided June 16, 1958)	34
United States v. *Noto*, 262 F. 2d 501	34
United States v. *Quincy*, 6 Pet. 445	31
United States v. *Rabinowich*, 238 U.S. 78	23
United States v. *Rumely*, 345 U.S. 41	28
United States v. *Sullivan*, 274 U.S. 259	37
United States v. *Wurzbach*, 280 U.S. 396	27
Virginian Ry. Co. v. *Federation*, 300 U.S. 515	27
Whitney v. *California*, 274 U.S. 357	7, 9, 10, 15, 19, 29, 32
Yates v. *United States*, 354 U.S. 298	6, 23, 29
Yazoo & Miss. R.R. v. *Jackson Vinegar Co.*, 226 U.S. 217	27
Constitution and statutes:	
United States Constitution:	
First Amendment	24
Fourteenth Amendment	10, 16
Act of June 25, 1948, c. 645, Section 1, 62 Stat. 808	13
Act of July 24, 1956, c. 678, Section 2, 70 Stat. 623	13
Alien Registration Act of June 28, 1940, 54 Stat. 670:	
Section 2(a)	12
Section 3	12
Internal Security Act of 1950, 64 Stat. 987, 50 U.S.C. 781, *et seq.*:	
Section 4(a)	33
Section 4(c)	33
Section 4(f)	33, 34, 35, 36
Section 8	35
National Labor Relations Act as amended, Section 9(h) (29 U.S.C. 159(h))	6, 16, 26
Smith Act, 18 U.S.C. 2385	3, 5, 10, 11, 12, 28, 29, 33, 35
18 U.S.C. 371	13
N.Y. Civil Rights Law, Art. V-A, c. 664, Laws 1923, p. 1110, Sec. 56	8
Miscellaneous:	
Federal Rules of Criminal Procedure, Rule 30	13
Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821	31

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 8

JUNIUS IRVING SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

In its order of June 29, 1959, 360 U.S. 924, setting this case down for reargument, the Court specified five questions to which counsel were requested to address themselves, as follows:

"(1) Is the Membership Clause of the Smith Act, 18 U.S.C. § 2385, valid under the Constitution of the United States if it be interpreted to permit a conviction based only on proof that the accused was a member of a society, group or assembly of persons described in the Act knowing the purposes thereof?

"(2) If not, is the Membership Clause constitutionally valid if interpreted as also requiring proof that the membership was accompanied by a specific intent of the accused to accomplish those purposes as speed-

ily as circumstances would permit? Does the Smith Act permissibly bear such an interpretation?

"(3) If the Membership Clause would not be constitutionally valid as interpreted under (1) or (2), would the clause be constitutionally valid if interpreted as requiring as an element of the crime proof that the accused was an 'active' member? Does the Smith Act permissibly bear such an interpretation? If not, and if the clause be valid without such element, does a constitutional application of the Membership Clause depend upon any such requirement, and if so was such a requirement properly applied by the courts in this case?

"(4) Whether the 'clear and present danger' doctrine, as interpreted by counsel, has application to the Membership Clause, either with respect to the accused or with respect to the 'society, group, or assembly of persons' described in the statute. If applicable, whether such doctrine was or can now be, properly applied in this case.

"(5) Is § 4(f) of the Internal Security Act, 50 USCA 780, a bar to the present prosecution? Counsel are requested to discuss the relevance of the registration provisions of that Act to this question."

We have here briefed, or rebriefed, these issues in the order followed by the Court, not attempting to reargue the other issues covered in our brief on the merits submitted last term. For the convenience of the Court, and to avoid referring back and forth between documents, our brief submitted in the 1958 Term

is reprinted in the back of this brief, following the inserted blue page.[1] Therefore, there is included within these covers all of the material on the basis of which we submit the case at this time.

The Smith Act (18 U.S.C. 2385), in its form applicable to this case, provided:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

[1] As to the "Jencks Act" discussion (Br. 99–112), this Court's decision in *Palermo* v. *United States*, 360 U.S. 343, substantially disposes of that issue.

> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

In answering the Court's questions, we shall assume in Point I that the statute requires proof of membership with knowledge of the association's aims, without proof of either specific intent or of activity, but subject to the proper application of the constitutional limitation of the "clear and present danger" test as discussed in Point IV. In Point II we assume the elements on which the discussion in Point I is based and add the element of specific intent, but not activity, again subject to the "clear and present danger" limitation. In Point III we assume the elements of Point II plus activity, again subject to the "clear and present danger" limitation. However, for the purpose of analysis, we note that these combinations by no means exhaust the possibilities. The "clear and present danger" doctrine could be considered a separate element and added or left out of each of the other groups. It would also be possible to consider intent and activity as alternative additional elements, rather than considering activity (as we do) only as it is added to intent.

I

THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS CONSTITUTIONAL EVEN THOUGH IT BE INTERPRETED TO PERMIT A CONVICTION BASED SOLELY ON PROOF THAT THE ACCUSED WAS A MEMBER OF A GROUP DESCRIBED IN THE ACT, KNOWING THE PURPOSES THEREOF

1. In our previous briefs in this case at the 1956 and 1958 Terms, we have not argued this point, assuming that this Court had construed the membership clause of the Smith Act to require proof of specific intent and that the term "membership" should be limited to active membership (1956 Br. 23, 39–41; 1958 Br. 47–55). Thus, we did not discuss the constitutionality of the clause in the absence of those requirements.

In *Dennis* v. *United States,* 341 U.S. 494, 499, it is stated: "We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence."[2] Although the opinion had specific reference to the first paragraph of the Smith Act, dealing with teaching and advocating overthrow, and to that portion of paragraph three which deals with organizing a group to teach or advocate such overthrow, the language

[2] The quotation is from the opinion of the Chief Justice, joined by Justices Reed, Burton and Minton. The concurring opinion of Mr. Justice Frankfurter assumes the same construction. 341 U.S. at 518. Mr. Justice Jackson, concurring, and Justices Black and Douglas, in dissent, were silent on the point.

and reasoning of the Court was generally applicable to the entire Act. The membership clause, here involved, is structurally a part of the same paragraph as the organizing clause. We, therefore, understand the Court's decision in *Dennis* to mean that intent to carry out the overthrow of the United States is a part of the offense prescribed. While in *Yates* v. *United States,* 354 U.S. 298, the grounds upon which the case was disposed of made it unnecessary for the Court to reexamine the specific intent required for conviction, assumptions by the Court in its consideration of the sufficiency of the evidence indicate no withdrawal from the position adopted in *Dennis.* See 354 U.S. 298 at 331 and 332. Earlier, the Court had given a similar construction to Section 9(h) of the National Labor Relations Act. *American Communications Ass'n* v. *Douds,* 339 U.S. 382, 406–408.

This case was tried on the premise that a showing of both intent to accomplish the overthrow of the government and active membership were necessary, and we have not asked the Court to consider the case in the absence of those factors. Nor do we do so now, since we continue to believe that specific intent is, under the statute, an essential part of the Government's case and that the proof of activity in this case aids in upholding the conviction either as a matter of construction or of constitutional application (see *infra,* pp. 11–27). Nevertheless, since the Court has asked for discussion of the issue, we submit that there is authority supporting the constitutionality of the provision even if it is applied as requiring neither the specified intent nor actvity beyond mere membership.

2. In the beginning, it is important to keep clear the specific intent which we are discussing. There is no question but that the statute in specific terms requires proof of knowledge of the purposes of the organization. A man is not punished for joining a subversive association in ignorance of its nature; the government must prove that he knew what he was doing. The intent referred to in the Court's question is the defendant's personal intent to carry out the purposes of the organization, a mental attitude going beyond *mens rea,* as that term is used to characterize criminal intent in common law crimes. See *Morissette* v. *United States,* 342 U.S. 246, 250–263. The intent here involved is an intent to overthrow the government of the United States by force and violence.

To test the question, let it be assumed that an individual with full knowledge of the objectives of the Communist Party becomes a member with no intention of aiding in bringing about a revolution, but because he believes action through the Party is the most effective way to secure social legislation, or public ownership, or a labor-conscious administration.[3] Let it be assumed further that no specific

[3] A harder case is involved if the individual not only does not intend that the objective shall be attained, but has the specific intent to divert the organization from its existing unlawful program. In such a case, it might well be unreasonable to construe the statute as applying to a person whose intent was entirely consistent with the Congressional purpose, at least until the failure of the individual's efforts had become clear. Cf. *Whitney* v. *California,* 274 U.S. 357, discussed *infra,* pp. 9–10.

activity, other than maintaining membership, was proved. There is authority for the proposition that the constitutional protections of free speech and the right to assembly and due process do not prevent Congress from making such membership a crime, even where the member's heart is not in it. This is supportable on the principle that knowingly joining an organization with illegal objectives contributes to the attainment of those objectives because of the support given by membership itself, and that it is the objective of the organization, not of the individual, which governs.[4]

This Court has infrequently considered the constitutionality of laws proscribing membership, but, where it has, it has upheld their validity without regard to such specific intent or to activity. In *Bryant* v. *Zimmerman*, 278 U.S. 63, a New York statute, aimed at the Ku Klux Klan, punished membership in certain oath-bound associations which had failed to register. The Court held that to forbid individual members to attend meetings or retain membership did not violate due process of law.[5] More recently in *N.A.A.C.P.*

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[4] In the present case the trial judge gave explicit instructions to the jury that it must find that the intent of the Communist Party, in addition to the petitioner's own intent, must be to bring about the overthrow of the government by force and violence (R. A 39–A 40).

[5] The petitioner seeks to distinguish the case on the ground that the statute dealt with registration (Pet. Br. 25–26). However, the statutory language was: "Any person who becomes a member [of a secret, oath-bound association] * * *, or remains a member thereof, * * * with knowledge that such corporation or association has failed to comply with any provision of this article, shall be guilty of a misdemeanor." Art. V–A, N.Y. Civil Rights Law, c. 664, Laws 1923, p. 1110, Sec. 56.

v. *Alabama,* 357 U.S. 449 at 465, the Court, in commenting on the earlier case, stated:

> * * * [In *Bryant* v. *Zimmerman*] this Court upheld, as applied to a member of a local chapter of the Ku Klux Klan, a New York statute requiring any unincorporated association which demanded an oath as a condition of membership to file with state officials copies of its * * * [constitution, membership lists, etc.]. In its opinion, the Court took care to emphasize the nature of the organization which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice.

Apparently, then, the Court did not feel that the intent or activity of the individual member was essential to the validity of the statute—as applied to that member—which it upheld on the basis that the legislature had authority to regulate such organizations having oath-bound memberships and therefore to punish membership in an organization which had not complied with the statutory requirements.

The information in *Whitney* v. *California,* 274 U.S. 357, encompassed violations of the California Syndicalism Act by reason not only of the defendant's participating in the organization of the California Communist Labor Party, but also her membership in it. One of the issues before this Court was her claim that in fact she personally opposed the illegal aims at

the time of its organization and that they were adopted over her protest. In treating with this claim, the Court, without exploring her own intentions, placed reliance on the fact that she had knowingly retained membership after the aims of the party had become clear. The majority of the Court, therefore, found nothing inconsistent with the Fourteenth Amendment in punishing knowing membership even without the element of specific intent to carry out the objectives of the association. The concurring opinion of Mr. Justice Brandeis, while differing strongly from the majority of the application of the clear and present danger doctrine, raises no question with respect to punishing membership, even in the absence of intent, if the element of immediate serious danger is satisfied.[6]

As to the Smith Act itself, the Court of Appeals for the Fourth Circuit discussed the membership clause

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[6] The petitioner and the government differ so widely on the meaning and significance of the concurring opinion of Justices Brandeis and Holmes in the *Whitney* case that it is probable that the only way to resolve the difference is to read the statements against the contents of the opinion itself. However, we call to the attention of the Court the fact that Miss Whitney was convicted on count one of the information which charged her with organizing and becoming a member of the Communist Party of California. 274 U.S. 357, 360. Therefore, when the concurring opinion talks about the intent to "commit present serious crimes" (274 U.S. at 379), it must be talking about acts of the Party to which the petitioner was connected through her membership. In this respect, therefore, the case, including the concurrence, supports the position of the government that membership in a subversive organization with knowledge of its aims may constitutionally be made the basis for criminal liability.

in *Frankfeld v. United States,* 198 F. 2d 679 at 683–684, certiorari denied, 344 U.S. 922, saying:

> * * * So far as "membership" in an organization advocating * * * destruction or overthrow [of government] is concerned, such membership is condemned only where there is knowledge on the part of the accused of the unlawful purpose of the organization. Membership in an organization renders aid and encouragement to the organization; and when membership is accepted or retained with knowledge that the organization is engaged in an unlawful purpose, the one accepting or retaining membership with such knowledge makes himself a party to the unlawful enterprise in which it is engaged.

Moreover, the same construction of various state syndicalism laws has been upheld in the state courts. *People* v. *Ruthenberg,* 229 Mich. 315, writ of error dismissed, 273 U.S. 782; *State* v. *Laundy,* 103 Ore. 443, 500; *State* v. *Hennessy,* 114 Wash. 351, 368. And even those state decisions which have construed state syndicalism laws as requiring intent have reached this result, not on the basis of constitutional necessity, but merely as a matter of legislative purpose. *People* v. *Gitlow,* 195 App. Div. 773, 794; *State* v. *Kahn,* 56 Mont. 108; *Commonwealth* v. *Widovich,* 295 Pa. 311.

Therefore, we conclude that there is authority to support the proposition that the elements of intent to bring about the overthrow of the government by force and violence, and of affirmative activity in addition to membership, are not essential to the constitutionality of the membership clause of the Smith Act.

However, as pointed out above, we do not urge the Court to adopt this position since we do not believe it is a correct construction or application of the statute or an issue necessary to be passed upon in view of the record now before the Court.

II

THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS PROPERLY INTERPRETED AS REQUIRING PROOF OF SPECIFIC INTENT AND AS SO INTERPRETED IS CONSTITUTIONAL.

1. The first paragraph of the Smith Act (the advocacy clause), *supra*, pp. 2–3, punishes *knowing* or *willful* advocacy of the duty of overthrowing the government by force or violence; the second paragraph (the literature clause) punishes the publication of written or printed matter advocating such overthrow when done with the *specific intent* to cause such a result; the third paragraph comprises both the so-called organizing clause and the membership clause, forbidding respectively the organizing of societies which advocate violent overthrow, and membership in such societies *with knowledge* of the organization's purpose.[7]

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[7] As originally enacted in Title I of the Alien Registration Act of June 28, 1940, 54 Stat. 670, the advocacy clause constituted Section 2(a)(1) of that Act; the literature clause was Section 2(a)(2); and the organizing and membership clauses were contained in Section 2(a)(3) of the Act. In addition, Section 3 of the Alien Registration Act contained a special conspiracy provision. Section 2(a)(1) and the organizing clause of Section 2(a)(3), as originally enacted, were involved in *Dennis* v. *United States*, 341 U.S. 494, since the conspiracy there charged was alleged to have run from April 1, 1945, to July 20, 1948. When the Criminal Code was revised in 1948, the phraseology of Section 2 of the Alien Registration Act was changed to effect consolidation but without any change of sub-

Since the literature clause expressly requires a specific intent to overthrow the government, and because of the absence of precise language calling for a specific intent in the advocacy and conspiracy clauses, it was claimed in *Dennis* v. *United States*, 341 U.S. 494, 499, in an attempt to create a more difficult constitutional issue, that Congress deliberately omitted any such requirement. The Chief Justice indicated that since the *Dennis* defendants had themselves requested a charge with respect to specific intent, under Rule 30 of the Federal Rules of Criminal Procedure they appeared to be barred from raising this point on appeal (341 U.S. at 500, fn. 2); but, nevertheless, he discussed the point because of its importance to the administration of the statute. *Ibid.* In rejecting the contention, he said:

> * * * It would require a far greater indication of congressional desire that intent not be made an element of the crime than the use of the disjunctive "knowingly *or* willfully" in * * * [the paragraph containing the advo-

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stance, the numbering of the individual paragraphs was dropped, and Section 2 was recodified as 18 U.S.C. (1952 ed.) 2385. Section 3 (the special conspiracy provision) was also omitted as covered by the general conspiracy provision of 18 U.S.C. 371. Act of June 25, 1948, c. 645, § 1, 62 Stat. 808. This is the form of the statute as applicable to the instant case.

The statute has since been amended by the Act of July 24, 1956, c. 678, § 2, 70 Stat. 623, to provide for an increase of the maximum fine from $10,000 to $20,000, and an increase in the maximum sentence from 10 to 20 years. In addition, this most recent amendment reinstated as part of 18 U.S.C. 2385 the special conspiracy provision.

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> cacy clause], or the omission of exact language in * * * [the paragraph containing the organizing and membership clauses]. The structure and purpose of the statute demand the inclusion of intent as an element of the crime. Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. *We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence.* [Citing cases.]
>
> Nor does the fact that there must be an investigation of a state of mind under this interpretation afford any basis for rejection of that meaning. * * * The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. [341 U.S. at 499–500; emphasis added.]

It is in the face of this explicit holding that the petitioner argues that the membership clause should not be construed as requiring specific intent. It is true that the membership clause itself was not in issue in *Dennis,* but its reasoning is nonetheless compelling here.

The attempt of the petitioner to distinguish between the construction of the organizing clause and the membership clause, insofar as reading into them a requirement of specific intent is concerned (Pet. Supp. Br. 15–17), is not convincing. There would seem to be

quite as much intent implicit in joining an organization with full knowledge of its purposes, which have already been established, as there is in organizing an association the aims of which may not have been fixed.[8] In fact, in *Whitney* v. *California,* 274 U.S. 357, where this Court upheld the validity of a conviction under the California law without reference to the specific intent of the defendant (*supra,* pp. 9–10), it appears that the Court read more legal significance into Miss Whitney's continued membership in the Communist Labor Party of California after the organization was completed and the aims of the party defined than it did in her participation in its organization.

It seems clear that in reading intent into the advocacy and organizing clauses in *Dennis* the Court contemplated the same interpretation for the Act as a whole. Such an interpretation is supported by all the cases in which the Court has followed the long-established practice of favoring an interpretation which, not only supports constitutionality, but avoids serious constitutional issues. However, two are particularly pertinent here.

In *Screws* v. *United States,* 325 U.S. 91, the Court was faced with the problem of construing a provision of the Civil Rights Act which made it a crime to de-

[8] The petitioner paraphrases the organizing clause as forbidding the organizing of groups "to" advocate the overthrow of the government (Pet. Supp. Br. 16). The language of the paragraph makes illegal the organization of any group "who" advocates such overthrow. Therefore, there is nothing specific in the language to require the element of intent which the Court found was implied.

prive a person of any rights guaranteed him by the due process clause of the Fourteenth Amendment. The opinion of Mr. Justice Douglas, upholding the constitutionality of the Act, was based on a construction that the Act required a specific intent to deprive a citizen of his constitutional rights. Thus the Court avoided the very type of constitutional problem which the petitioner seeks to inject in this case. Similarly, in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, where the Court was dealing with the non-Communist affidavit requirement of Section 9(h) of the National Labor Relations Act, belief in the overthrow of the government by force was interpreted to require specific intent to accomplish such a result, rather than a mere abstract feeling that such a process was inevitable. Thus again, the Court, by construction, upheld a statute which would otherwise involve a serious constitutional issue. The same should be done here.

2. Construing the membership clause to require a specific intent to bring about the violent overthrow of the government serves two important functions. Firts, it precludes the statute's application to membership in organizations in order to participate in abstract or academic discussions of the idea of revolt. Second, it precludes its application to membership in an organization where the individual—though aware of the unlawful purposes of the organization—does not believe or desire that complete overthrow can or should be attained, but participates in order to reach intermediate goals short of that goal and perhaps entirely legal in themselves. In the present case, the specific

intent and purpose of the petitioner is so obvious as to obscure the importance of that factor in closer cases (1958 Br. 85–88). In borderline cases, however, construing the clause to require a specific intent would be of crucial importance for it provides both juries and judges with an adequate means to prevent the application of the Act to persons who in no way contribute to the dangers with which Congress was concerned. Cf. *Hartzel* v. *United States*, 322 U.S. 680, a World War II prosecution under the Espionage Act of 1917, where this Court reversed the conviction because of the paucity of evidence respecting the requisite specific intent of the defendant. Dissenting from the majority conclusion, Mr. Justice Reed, with whom Justices Frankfurter, Douglas and Jackson joined, said:

> * * * The right of free speech is vital. But the necessity of finding beyond a reasonable doubt the intent to produce the prohibited result affords abundant protection to those whose criticism is directed to legitimate ends. [322 U.S. at 694.]

Justices Holmes and Brandeis appear to have considered that a specific intent to produce prohibited evils is a substitute for, or equivalent to, a "clear and present danger" that speech will produce such evils, at least in those cases where the latter "test" applies. Although we do not concern ourselves under this point with the "clear and present danger" doctrine as such (see *infra*, pp. 28–32), we advert to it insofar as a specific intent requirement has relevancy to that subject. Justice Holmes suggested this inter-relation in

Schenck v. *United States,* 249 U.S. 47, 52, when he said: "If the act (speaking, or circulating a paper), its tendency and *the intent with which it is done* are the same, we perceive no ground for saying that success alone warrants making the act a crime" (emphasis added). And he developed the idea at some length in his dissenting opinion in *Abrams* v. *United States,* 250 U.S. 616, 627–628, as follows:

> I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck, Frohwerk* and *Debs,* 249 U.S. 47, 204, 211, were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces *or is intended* to produce a clear and imminent danger that will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.
>
> But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its

> opinions would hinder the success of the government aims or have any appreciable tendency to do so. *Publishing those opinions for the very purpose of obstructing however, might indicate a greater danger* and at any rate would have the quality of an attempt. So I assume that the second leaflet if published *for the purpose* alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. * * * [Emphasis added.]

Almost identical language appears in Mr. Justice Brandeis' concurrence in *Whitney* v. *California*, 274 U.S. 357, 373:

> * * * That the necessity which is essential to a valid restriction does not exist unless speech would produce, or *is intended to produce*, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. [Emphasis added.][9]

And this Court has put the matter thus in *Taylor* v. *Mississippi*, 319 U.S. 583, 589–590:

> As applied to the appellants * * * [the Mississippi statute which punished advocacy of refusal to salute the flag] punishes them although what they communicated is not claimed or shown to have been done *with an evil or sinister purpose*, to have advocated or incited subversive action against the nation or state, *or* to

[9] Significantly, in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 395, the Court quoted with approval this statement of Mr. Justice Brandeis.

have threatened any clear and present danger to our institutions or our Government. [Emphasis added.]

3. When the Act is read to encompass the element of intent, the views expressed in Point I, *supra,* with respect to the constitutionality of the membership clause are reinforced. Actually, the issue would seem foreclosed by the *Dennis* case itself. It is difficult to see how these two parallel provisions, the organizing clause and the membership clause, can, if the same intent is read into each, have different constitutional results.

At the risk of laboring the obvious, it is helpful to re-examine the structure of the Smith Act as a whole. In all its paragraphs, it is explicitly aimed at "advocacy" of overthrow of the government by force or violence. The first paragraph strikes at direct advocacy by an individual; the second at responsibility for publications which advocate the illegal action; the organizing clause deals with organizing an association which engages in such advocacy; and the membership clause outlaws knowing affiliation with an organization so engaged. All sections, including the conspiracy provisions now re-enacted into the law (see fn. 7; *supra,* p. 12), deal with direct or indirect advocacy of overthrow. It is difficult to argue that knowing membership in an illegal enterprise with intent to carry out its purposes is too tenuous a connection between the individual and the advocacy to form a basis for liability while organizing, conspiring, or publishing for the same ends may be punished. (See also 1958 Br. 48–56.)

These views were well expressed by District Judge Kraft in *United States* v. *Blumberg*, 136 F. Supp. 269, 271 (E.D. Pa.):

> However defendant vigorously maintains that the means by which this power [to prohibit acts intended to effect the violent overthrow of Government] is carried into execution by the membership clause of the Smith Act are not appropriate or plainly adapted to the end of protecting the Government from armed rebellion. Defendant concedes that a conspiracy to organize a group who advocate violent governmental overthrow may constitutionally be made a crime. *It would be strange logic, indeed, to hold that an agreement to organize such a group may be made criminal, but that membership in the group organized pursuant to such a conspiracy, with knowledge of its purposes, may not be made a crime.* [Emphasis added.]

III

THE CONSTITUTIONALITY OF THE MEMBERSHIP CLAUSE IS FURTHER FORTIFIED BY THE REQUIREMENT THAT THE MEMBERSHIP BE ESTABLISHED AS ACTIVE MEMBERSHIP, AND THIS REQUIREMENT IS REASONABLY TO BE INCLUDED EITHER AS A MATTER OF STATUTORY CONSTRUCTION OR AS A CONSTITUTIONAL LIMITATION ON THE APPLICATION OF THE ACT

1. The first sentence in the Court's questions about this issue (*supra*, p. 2) asks whether the constitutionality of the membership clause would be aided by adding the requirement of proof that the membership is active. An indication of the answer to this ques-

tion is found in the petitioner's repeated assertions that there was no charge that the petitioner performed any act whatever (Pet. Br. 3) or engaged in any Party activity (Pet. Br. 24); that the indictment charges nothing more than a state of mind (Pet. Br. 25); that there is absent from the charge an allegation of agreement or participation (Pet. Supp. Br. 31); and other picturesque ways of laying a foundation for the argument that under our law guilt must be brought home to an accused by reason of his individual action. To the petitioner it is clearly a strong point that conviction under the membership clause does not require a showing of activity of any kind.

It was to meet this false premise that the element of "active membership" was first explicitly introduced into the case through the government's supplementary memorandum after the first argument. (Gov't Supp. Memo. on Reargument, Nos. 3 and 4, October Term, 1957). But all along, the case had been briefed and argued by the Government on the theory that membership was not a passive state, but an affirmative support of the aims and purposes of the organization. (Gov't Br. in *Scales* v. *United States*, No. 3, October Term, 1956, pp. 23, 41.) We had also pointed out that, with respect to the Communist Party, membership was, under its rules, active membership. (*Id.*, p. 42; *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 431–432.)

The necessity of establishing active membership, either to meet a reasonable construction of the word "membership", or, alternatively, as a constitutional

limitation on the application of the Act, does help in upholding its constitutionality. This is so even though the activity be expended along lines not otherwise illegal, since active support of any kind aids the organization in achieving its own illegal purposes. The solicitation of membership, the contribution of financial assistance, or the handling of public relations all help the organization and therefore indirectly promote its objectives. In an army there must be not only fighters, but also suppliers, and transporters and medical aides. Any activity which contributes to the ultimate success of the undertaking bears its share of responsibility for that outcome.[10]

The trial court in this case gave a severe definition of what was necessary to constitute active membership, stating (R. A–41):

> On the other hand, if you believe beyond a reasonable doubt that the Communist Party was such a group or society, then you should next consider whether the defendant, Scales, was an active member of, or affiliated with, the Party with knowledge of its aims and purposes. The defendant admits that he was a member of the Party. For his membership to be criminal, however, it is not sufficient that he be simply a member; it must be more than a nominal, passive, inactive, or purely technical membership. In determining whether he

[10] In the comparable situation with respect to the nature of overt acts necessary to sustain a conviction for conspiracy, this Court recently held that the acts need not themselves be illegal. *Yates* v. *United States*, 354 U.S. 298, 334. See also *Pierce* v. *United States*, 252 U.S. 239, 244; *United States* v. *Rabinowich*, 238 U.S. 78, 86; *Braverman* v. *United States*, 317 U.S. 49.

> was an active or inactive member, consider how much of his time and efforts he devoted to the Party. To be active he must have devoted all, or a substantial part, of his time and efforts to the Party. Moreover, to be criminal, the activities of the membership and knowledge of the Party aims and purposes must have existed within the period from November 18, 1951, to November 18, 1954.

This hard standard for activity can be accepted for this case since the jury found that it was met. Except for purposes of analysis, it is not necessary to consider the quantity or quality of petitioner's activity; acting as chairman of the Communist Party of North Carolina for an extended period of time, recruiting and instructing new members, and participating in special Communist schools, must certainly suffice in both particulars. It is the case before it, involving the activities of this petitioner, on which the Court must pass judgment, not some hypothetical set of facts which may never arise. In *McComb* v. *Frank Scerbo & Sons, Inc.*, 177 F. 2d 137, 141 (C.A. 2), Judge Frank stated, "I think it always unwise for a court to cross hypothetical constitutional bridges; crossing actual ones is dangerous enough." See *Fleming* v. *Rhodes*, 331 U.S. 100, 104; *Blackmer* v. *United States*, 284 U.S. 421, 442.

Requiring a showing of active membership not only meets any due process objection on the ground of personal responsibility, but it also takes the strength out of the argument that the membership clause runs afoul of the First Amendment. If all that was involved were bare membership, or bare membership

plus some attendance at Party meetings, there would be more foundation for the argument that freedom of speech and of the right of assembly was impaired. Cf. *De Jonge* v. *Oregon*, 299 U.S. 353, finding unconstitutional the provision of the Oregon syndicalism law forbidding presiding at or assisting in conducting a meeting of a certain type of organization. This argument disappears when the requirement of activity is added.

Therefore, the answer to the first branch of the Court's question is that adding the element of activity does aid in sustaining the constitutionality of the membership clause whether that element is incorporated as a matter of interpretation or as a test of constitutional application (akin to the "clear and present danger" test).[11]

2. The second question posed by the Court in this part of its reargument order is whether the statute can properly be construed to require proof of active membership. An affirmative answer to this does not mean that activity must be alleged as a separate element of the crime, as the petitioner suggests (Pet. Supp. Br. 19). Rather, an allegation of membership in the indictment must mean membership in the sense

[11] The element of activity is pertinent to a jury's consideration of a case under the membership clause, not only because of the question of construction, but also because the defendant's activity is one of the best ways of proving his intention, a factor which, as we point out above, should be part of the government's burden of proof. Two of the state cases emphasize this significance of evidence of a defendant's activity. *People* v. *Lloyd*, 304 Ill. 23, 87–89; *Shaw* v. *State*, 76 Okla. Cr. 271, 310.

in which Congress used the term and it then becomes a matter of instructions to the jury as to what that term requires in the way of proof. This is analogous to the Court's reading of additional meaning into the word "belief" in the National Labor Relations Act, as it did in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 407, or the word "wilfully" in *Hartzel* v. *United States*, 322 U.S. 680, 686–687.

The propriety of interpreting the membership clause to include the requirement of activity is supported not only by the policy of construing statutes so as to avoid questions of constitutionality (*supra*, pp. 15–16), but also by specific holdings of this Court giving a similiar interpretation to comparable words in other statutes. In *Galvan* v. *Press*, 347 U.S. 522, it was determined that Congress in providing for deportation on the basis of membership in the Communist party intended something more than "nominal" membership. 347 U.S. at 527. See also *Rowoldt* v. *Perfetto*, 355 U.S. 115. *Galvan* follows the earlier decision in *Bridges* v. *Wixon*, 326 U.S. 135, where the term affiliation was construed to require a working alliance. And both of these decisions follow the district court decision in *Colyer* v. *Skeffington*, 265 Fed. 17, 72 (D. Mass.), reversed on other grounds *sub nom. Skeffington* v. *Katzeff*, 277 Fed 129 (C.A. 1).

3. But, whether or not the concept of activity is comprehended within the word "membership", in any event it is a proper consideration for the courts, either trial or appellate, to apply in determining whether the statute is constitutional in its impact on particular cases. Just as in the application of the

"clear and present danger" principle a court must decide whether in the individual case the application of the restriction on speech is really necessary to avert serious peril to the country, so here a court should, even if it doubts that an application to a passive communist would be constitutional, consider its constitutionality as applied to a dedicated, full-time, proselytizing communist. If the Act would be constitutional as so applied, then the only question remaining would be whether the various applications are separable. (See also 1958 Br. 65–66.)

Many times this Court has stated that it will not upset an act of Congress because in some hypothetical case the law could have an unconstitutional application. See, *e.g. Steamship Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39; *Yazoo & Miss. R.R.* v. *Jackson Vinegar Co.,* 226 U.S. 217, 219; *Fleming* v. *Rhodes,* 331 U.S. 100. And again the Court has said that it will consider only the case as it affects the petitioner, not some other individual not before the Court. *Blackmer* v. *United States,* 284 U.S. 421; *Virginian Ry. Co.* v. *Federation,* 300 U.S. 515; *United States* v. *Wurzbach,* 280 U.S. 396. Sometimes, the issue has been stated in terms of whether Congress intended the statute to continue to be enforced in one application, if it is held unconstitutional in some other application. *Dorchy* v. *Kansas,* 264 U.S. 286; *The Abby Dodge,* 223 U.S. 166; *National Labor Relations Board* v. *Jones & Laughlin,* 301 U.S. 1. On this issue of separability, as in other questions of construction, the Court will adopt a construction, if it sees its way clear to do so, which will save the Act rather than

destroy it. *United States* v. *Rumely,* 345 U.S. 41; *Ashwander* v. *T.V.A.,* 297 U.S. 288.

Therefore, the answer to the final portion of this third question, is that, wholly apart from statutory construction, there is here a constitutional application of the statute to a defendant whose activity in the Communist cause would meet the strictest test conceivable. Whatever its application to other cases, the Act is constitutional in its present application.[12]

IV

THE "CLEAR AND PRESENT DANGER" TEST AS APPLIED TO THE MEMBERSHIP CLAUSE AND TO THIS PARTICULAR CASE SUSTAINS THE CONSTITUTIONALITY OF THE CONVICTION

1. Exhaustive consideration was given to the application of the "clear and present danger" doctrine to the Smith Act in *Dennis* v. *United States,* both in the Court of Appeals, 183 F. 2d 201, and in this Court, 341 U.S. 494. Although both courts recognized that applications of the test had not been consistent through the years, it was concluded that the test was applicable to the Smith Act, or at least to the conspiracy provision of the Smith Act, and the main opinion in this Court specifically accepted Judge

[12] Of all of the state and federal cases cited by both parties to this case in this field, none deals with a factual situation where the accused was not shown to be active in some official capacity in carrying out the aims of his organization. Even in the *De Jonge* case, 299 U.S. 353, the conviction was thrown out, not because De Jonge had not been an active member of the party, but because the indictment alleged only his assistance in the conduct of a meeting.

Hand's formulation of it in relation to the Smith Act. 341 U.S. at 510. In *Yates* v. *United States,* 354 U.S. 298, there was no withdrawal from that position. Although fine lines of distinction have been drawn in applying the test, we had not thought that there was sufficient distinction between the offense proscribed by the membership clause, as properly construed, and the conspiracy, advocacy, or organizing clauses to justify asking the Court to reconsider the matter. Therefore, in the trial of the case and in our prior presentations to this Court we have assumed that the rule applied here as it did in *Dennis* (1958 Br. 66).

2. However, since the Court has invited reconsideration of the matter, it is appropriate to re-examine the application of the test in the light of this particular case.

Certainly, there is support in the majority opinions in *Gitlow* v. *New York,* 268 U.S. 652, and in *Whitney* v. *California,* 274 U.S. 357, for the proposition that where Congress has dealt directly with aspects of speech, as it has here in proscribing direct or indirect advocacy of violent overthrow, the issue is properly one of whether the Congressional determination of the necessity of such restriction is reasonable and, if it is, there is no occasion to apply the "clear and present danger" test to the individual case. If this is the proper rule, there is now no real issue as to the reasonableness of Congress's action in forbidding the type of advocacy outlawed in the Smith Act, since this Court has in other contexts upheld Congressional authority with respect to participation in the type of organization here involved. See the concurrence of

Mr. Justice Frankfurter in *Dennis* v. *United States*, 341 U.S. 494, 546–552; Mr. Justice Jackson in *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 424–433; *Barenblatt* v. *United States*, 360 U.S. 109, 127–128. However, in this particular case, if the Court adheres to the position of the main opinion in *Dennis*, the existence of a clear and present danger from participation in the Communist Party at the present stage of our history, as reviewed in our 1958 brief, pp. 75–88, 121–139, supports the application of the Act to this case as fully as the corresponding facts before Congress justified it in making its legislative judgment.

There is, however, one aspect of the case which was not specifically referred to in *Dennis* and which supports the view that, if the statute be given the construction which we urge in earlier sections of this brief, there is no necessity for the application of the "clear and present danger" test at all. If we are right in our contention that the statute requires proof of a specific intent to carry out the aims of the organization to bring about the overthrow of the government by force and violence (*supra*, pp. 11–21), then, even under the strictest views of Justices Holmes and Brandeis, this illegal intent dispenses with the occasion for the additional qualification that the danger be immediate. This goes back to the theory of *Fox* v. *Washington*, 236 U.S. 273, which held that the right of free speech does not include the right to incite actual breaches of the law. Certainly the overthrow of the government by force and violence is illegal and it seems that intentional activity to stir

others to accomplish that end comes within the rule of the *Fox* case. The Court of Appeals for the Fourth Circuit, in dealing with a case under the membership clause that followed the *Dennis* case (*Frankfeld* v. *United States*, 198 F. 2d 679, 684, certiorari denied, 344 U.S. 922), stated:

> The defendants contend that these provisions [literature and membership clauses] of the statute are unconstitutional because they do not require a "clear and present danger" as a condition of criminality; but it would be little short of absurd for a statute to forbid advocacy of the destruction of the government or membership in an organization formed for the purpose of such advocacy only in the event that they result in "clear and present danger". This would be to make the near-success of an attempted crime the criterion of criminality for making the attempt.

We suggest, therefore, that if the Court does desire to reconsider the applicability of the "clear and present danger" doctrine to the Smith Act, it should consider whether, if the statute is properly construed to require specific intent and activity, there remains any need for the additional limitation based on the probabilities of success. It is too late to doubt that it is entirely appropriate to punish an individual for deliberately attempting an illegal act, even where his realistic chances of accomplishing it are uncertain, or even slight. *United States* v. *Quincy*, 6 Pet. 445, 465; Sayre, *Criminal Attempts*, 41 Harv. L. Rev. 821.

3. It is our view that if the "clear and present danger" doctrine is applicable at all to this case, it is to be applied with regard to the danger to be anticipated

from the Communist Party rather than from the individual membership of this particular petitioner. It would be the same as writing the Act off the books to require that the government prove that it is in danger of overthrow from the activity of any individual. This petitioner's membership is his contribution to the common end, and it is his membership, plus that of his associates, that gives the Party power. Nominal, *pro forma,* membership by itself might well be held to be no contribution at all; but once the statute is interpreted or applied as we have suggested there remains no question but that the "danger" test is to be applied to the organization. This has been the uniform practice in this type of case. *Gitlow* v. *New York,* 268 U.S. 652; *Whitney* v. *California,* 274 U.S. 357; cf. *American Communications Ass'n* v. *Douds,* 339 U.S. 382.

We have no doubt that the "clear and present danger" test, properly applied in this case, upholds the conviction of the petitioner.[13] That the peril is real has been attested by the experience of this and other nations which have been subject to infiltration by such organizations from within. See 1958 Br. 39–45. That

[13] Since the "clear and present danger" doctrine is a test of constitutionality in the application of restraints on speech, not an element of the offense to be proved in making out a case, it is clear that the determination is a question of law to be decided by the trial court if the question is raised before it and to be reviewed by the appellate courts. Therefore, the proper test can now be applied by this Court on the basis not only of the record in the particular case but also of all of the facts of which the Court may take judicial notice. *Dennis* v. *United States,* 341 U.S. 494, 514.

the peril is sufficiently immediate to justify governmental restrain is attested by the sensitive international situation which has resulted in the country's living in a state of emergency year after year. There is no reason for the Court to blind itself to a world situation of which Congress, the Executive, and the public generally are fully conscious.

V

SECTION 4(F) OF THE INTERNAL SECURITY ACT DOES NOT BAR PROSECUTION UNDER THE MEMBERSHIP CLAUSE OF THE SMITH ACT[14]

In the course of repeated briefing and argument of this case, the petitioner has become so entangled in the ultimate purposes and the Congressional history of Section 4(f) of the Internal Security Act (50 U.S.C. 783(f))[15] that he appears to have forgotten what it actually does. What it does is to modify subsections (a) and (c) of the same section and to amend all other criminal statutes dealing generally or specifically with offenses arising out of association with the Communist Party as though there were read into each of them the language of Section 4(f). The Smith Act can now be

[14] See also pp. 68–74 of our 1958 brief.

[15] The provision reads:

"Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

read as though it included an additional paragraph reading "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of this Section." The question we have is whether active membership with knowledge of the aim of the Party and with specific intent to carry out those aims is "membership per se". The court below held not, and so have all other federal courts which have had the issue before them. *Lightfoot* v. *United States,* 228 F. 2d 861, 870–871 (C.A. 7), reversed on other grounds, 355 U.S. 2; *United States* v. *Blumberg,* 136 F. Supp. 269, 273 (E.D. Pa.); *United States* v. *Noto,* 262 F. 2d 501, 508 (C.A. 2); *United States* v. *Hellman* (D. Mont., Cr. 3722, decided June 16, 1958). They reach this result because neither the language nor the purpose of Section 4(f) indicates any other result.

The language of Section 4(f) does not apply to this case because the specific use of the term "per se" bars it. Obviously, this provision was included in the Internal Security Act in order that the very facts making registration necessary under that Act would not in and of themselves constitute a federal crime. To constitute a violation of any federal criminal statute, Congress said, there must be something more. And there is something more in the provisions of the membership clause, namely, knowledge of the intent of the organization, and, under the decision in the *Dennis* case, specific intent to carry out the aims of the Party. This is not membership per se.

The question then arises, if Congress did not believe that either the Smith Act or any other statute pun-

ished membership per se, why did it write Section 4(f) into law? The answer is that through this device Congress hoped to bolster the validity of the registration provisions. (See 1958 Br. 70–72.) If by registering one confessed all of the elements of a federal offense, he could well argue that the requirement of registration was a plain violation of the privilege against incrimination. So Congress specifically recited that the bare fact leading to registration, *i.e.*, membership, is not per se a crime. When, or if, individual Communists are required to register under Section 8 (which will occur only when the Party fails to register) it is possible that they may still argue that the registration requirement is unconstitutional because it requires them to incriminate themselves on an essential element of a crime (even if not the whole crime). It will be time enough to meet that problem when it arises. But if these Communist members are successful in that plea, the result will be invalidation of that portion of the Internal Security Act, not the repeal of the Smith Act.[16]

The petitioner has repeatedly made the argument that, as we interpret the provision, registration will be required only of Communists who do not know the objectives of the Party. (Pet. Br. 48; Pet. Supp. Br. 37.) But Section 4(f) does not relieve any one

[16] Implied repeal of the membership clause of the Smith Act would not obviate the problems inherent in the registration provisions. Individual Communists would still argue that registration compels incrimination with respect to other clauses of the Smith Act, as well as other federal legislation, *e.g.*, the sedition laws. See *Blau* v. *United States*, 340 U.S. 159.

at all of the necessity of registration. The fact that only Communists with knowledge and intent are the subject of prosecution under the Smith Act and that naive Communists, if there are any, are completely secured from such prosecution, does not at all mean that only the naive Communists are required to register under the Internal Security Act. Perhaps the sophisticated Communists may object on the ground of self-incrimination, and, if so, the courts will have to decide that issue when it arises. The petitioner's fault is to read Section 4(f) as though it dealt with the necessity of registration rather than with susceptibility to criminal prosecution. It is at this point that he loses contact with the present case.

The petitioner would also support his argument by the fact that Section 4(f) provides not only that membership per se shall not be a crime but that holding of office shall likewise not per se be criminal. He argues that office holding, as we admit, is itself "strong evidence" of knowledge of the Party's aims. This, we suppose, leads to the conclusion that it will be rare indeed that one can find a Communist official who is ignorant of the aims of the Party. It seems unlikely that Congress really believed that there would be instances of this. But, in effect, Congress has said that it would take no chances in drafting this legislation; no harm would be done in exempting such a person (*i.e.*, the ignorant official) from the criminal law and it might help to sustain the constitutionality of the Internal Security Act. Therefore, Congress could

write in the exemption even though it believed it would have little or no application.

We do not assume from the fifth question in the Court's order that it desires a general discussion of the constitutionality of the registration provisions of the Internal Security Act at this time. However, we refer the Court to *Shapiro* v. *United States*, 335 U.S. 1, and *United States* v. *Sullivan*, 274 U.S. 259, for holdings relating to the authority of the federal government to require records and reports which may in fact serve as a link in establishing a criminal act. It may well be that Congress had these decisions in mind when it determined to go ahead with registration of Communist organizations.

CONCLUSION

For the reasons stated in our 1958 brief as supplemented above, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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